(19)

No. 94-1837

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER
OF THE STATE OF FLORIDA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF RESPONDENTS
FLORIDA ASSOCIATION OF LIFE UNDERWRITERS,
PROFESSIONAL INSURANCE AGENTS
OF FLORIDA, INC., and
FLORIDA ASSOCIATION OF INSURANCE AGENTS**

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

59 pp

QUESTIONS PRESENTED

1. Whether Petitioner has produced an unambiguous showing that, in enacting 12 U.S.C. § 92 with the goal of permitting small-town national banks to compete with state-chartered banks that could sell insurance, Congress expressed its "clear and manifest intent" to preempt traditional state law controlling the identities and activities of those licensed to sell insurance in the State?

2. Whether a state law that protects policyholders by prohibiting licensed agents from affiliating with certain financial institutions was "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

3. Whether a provision of federal law buried in the Federal Reserve Act that grants some national banks charter authority to sell insurance, but expresses no intent to intrude upon traditional state insurance regulation, "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

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STATEMENT

This case involves the authority of the Florida Department of Insurance (the "Department") to exercise its traditional police power to regulate the sale of insurance within the State's borders. Like every other State, Florida requires any agent who solicits or sells insurance to be licensed by the State. In order to prevent coercion of insurance purchasers, undue concentration of resources, and unfair competition, the Florida Legislature has determined that licensed insurance agents should not be employed by certain financial institutions, including both

state-chartered and federally chartered bank affiliates of holding companies. There is no question Florida can bar state-chartered banks from selling insurance. Petitioner argues, however, that Congress intended for national banks to have greater rights than state banks, and that federal law precludes state regulation of the insurance agency activities of national banks and their employees.

The Eleventh Circuit held that the Florida insurance regulation is not preempted by federal law that simply gives small-town national banks the corporate power to sell insurance, 12 U.S.C. § 92 ("Section 92"). That ruling is correct for two independent reasons. First, under traditional preemption doctrine, the federal authorization does not preempt Florida's evenhanded prohibition. Second, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, precludes an interpretation of Section 92 that would supersede Florida's insurance regulation.

A. Regulation of Insurance.

"Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 (1944). "It is practically a necessity to business activity and enterprise." *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414 (1914). In addition to protecting a large part of the country's wealth, insurance is the essential means by which the "disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired." *Id.* at 412. Thus, it is "the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation." *Id.*

1. Historically, States Exclusively Regulated Insurance.

To meet the "imperative need" for regulation, State Legislatures have enacted comprehensive bodies of law, dating back over one hundred years, to "control the insurance business." *South-Eastern Underwriters*, 322 U.S. at 544-45. State insurance law regulates every aspect of the business, such as: insurance companies (including assets, liabilities, and investments), insurance policies and rates, and those who solicit the purchase of and sell insurance on behalf of companies—*e.g.*, their agents. *See generally* Edwin Patterson, *The Insurance Commissioner in the United States* (1927).

Until 1944, it was universally understood that the States maintained exclusive control over the regulation of insurance. *E.g.*, *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39 (1978). This axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), which involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In rejecting the agent's argument that the Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce" and is "governed by the local law." *Id.* at 183. Subsequent cases held that the entire business of insurance was *not* interstate commerce regulable by Congress. Like *Paul v. Virginia* itself, many of these cases involved state statutes governing licensure of insurance companies and their agents.[1]

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[1] *E.g.*, *Hooper v. California*, 155 U.S. 648, 649 (1895); *Noble v. Mitchell*, 164 U.S. 367, 368-69 (1896); *Nutting v. Massachusetts*, 183 U.S. 553, 556 (1902); *Northwestern Mut. Life Ins. Co. v. Wisconsin*, 247 U.S. 132 (1918); *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 275-76 (1927).

Consistent with this caselaw and understanding, Congress routinely refused to extend federal authority over the conduct of the private-sector insurance business. Between 1902 and 1906, for example, numerous bills were introduced providing for federal regulation of various aspects of the insurance industry, but the judiciary committees of both the House and Senate concluded such regulation was beyond Congress' constitutional power. S. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess. 12-25 (1906). In 1914, in recognition of Congress' lack of authority, resolutions were introduced in both the House and Senate proposing that the Constitution be amended to give Congress the power to regulate the insurance industry. S.J. Res. 103, 63d Cong., 2d Sess.; H.R.J. Res. 194, 63d Cong., 2d Sess.

Thus, as of 1916, when the federal law at issue was enacted, Congress did not believe it could constitutionally regulate the general conduct of the private-sector insurance business in this country. Consequently, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co.*, 438 U.S. at 539.

2. Congress Affirmatively Declares a Policy of Not Regulating Insurance.

All this changed in 1944 with the Court's decision in *South-Eastern Underwriters*, which held that insurance companies are engaged in interstate commerce and are therefore subject to the federal antitrust laws. The decision, "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 113 S. Ct. at 2207. Congress quickly enacted the McCarran-Ferguson Act. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). Passed at the urging of the state insurance regulators directly affected by *South-Eastern*, McCarran "provides that regulation of the insurance industry is generally a matter for the States." *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2900 (1993).

In McCarran, Congress "not only has eschewed regulation; it has affirmatively declared a policy of not regulating the business of insurance."[2] The first section of the statute makes Congress' intention clear:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011. The statute then sets out a rule confirming that, in general, federal law does *not* preempt state laws regulating the insurance industry, and a more specific rule governing the interaction of federal antitrust laws and state insurance regulation. Section 2 of the Act provides:

> (a) The business of insurance, *and every person engaged therein,*[3] shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act . . . known as the Sherman Act, and the Act . . . known as the Clayton Act, and the Act . . . known as the Federal Trade Commission

[2] Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. Rev. 13, 14 (1993).

[3] Petitioner conveniently excludes this important clause from its quotation of the statute. Petr. Br. at 7.

> Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. at § 1012 (emphasis added). As this Court has noted, "[o]bviously Congress' purpose was broadly to give support to the existing and *future* state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429 (1946) (emphasis added).

3. Florida Insurance Regulation.

Florida certifies, supervises, and otherwise regulates insurance companies and their agents. Only licensed insurance agents may solicit or sell insurance in the State, or receive insurance premiums on behalf of an insurer. Insurance companies are *not* authorized to use intermediaries to do business in Florida unless the agents are licensed. *See* Fla. Stat. §§ 624.425, 624.428, 626.041, 626.051, 626.062.

The provision at issue, Section 626.988, is contained in the Unfair Insurance Trade Practices Act ("Part X"), located within the Florida Insurance Code. Part X was enacted as an express exercise of authority under McCarran. As stated in § 626.951:

> The purpose of this part is to regulate trade practices *relating to the business of insurance in accordance with the intent of Congress as expressed in [McCarran]*, by defining, or providing for the determination of, *all* such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (Emphasis added.)

Section 626.988(2) prohibits licensed insurance agents who are associated with, or employed or controlled by "financial institutions" from engaging in "insurance agency activities." Those activities are defined to exclude solicitation and sale of credit life insurance and credit disability insurance. § 626.988(1)(b). "Financial institution" is defined to include any type of bank or bank holding company, S&L or S&L holding company, or any subsidiary or affiliate thereof, but to exclude any bank—state or federally chartered—"which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." § 626.988(1)(a). Pet. Br. App. 3a-4a.

The legislative history of § 626.988 and state caselaw definitively construing the statute demonstrate that it was enacted to protect existing and future Florida insurance policyholders by preventing coercion in bank sales of insurance, undue concentration of economic resources in banks, and unfair trade practices by banks in the sale of insurance.

B. National Banks.

The national banking system grew out of the particular needs and nationalist fervor of the Civil War. At that time, there was no federal control of the monetary system. Coins supplied by the federal government were far surpassed in volume and aggregate value by circulating notes of state banks, whose value was not determined by Congress and varied widely.[4] In 1863, Congress responded by enacting the National Bank Act (the "NBA"), which created federally chartered banks empowered to issue and accept a uniform national currency.

National banks possess only those powers conferred by federal law. *See Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891). But "regulation of [national] banking has been one of dual control since the passage of the first National Bank Act in 1863." *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). As this Court explained in *McClellan v. Chipman*, 164 U.S. 347 (1896), "[n]ational banks . . . are governed in their

[4] Bray Hammond, *Banks and Politics in America* 723 (1957).

daily course of business far more by the laws of the State than of the nation." *Id.* at 356-57 (internal quotation omitted).

Federally regulated banking institutions are generally prohibited from engaging in non-banking activities, including the business of insurance. Section 24 of the NBA, 12 U.S.C. § 24, which sets forth the banking powers of national banks, has consistently been interpreted as strictly limiting their permissible insurance agency activities. *See, e.g., American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1016 (5th Cir. 1968).

In 1916, then-Comptroller of the Currency John Skelton Williams urged Congress to enact a narrow exception to this general prohibition to provide a modicum of financial assistance to national banks located in small "country communities." Letter from Williams to Sen. Owen, *reprinted in* 53 Cong. Rec. 11001 (1916). In the Comptroller's judgment, empowering these "small national banks" to sell insurance would enable them to "better compete" with those state-chartered banks that were permitted to sell insurance. *Id.* Comptroller Williams noted that under the NBA, national banks were not then empowered to sell insurance, *id.*, even if state law would permit them to do so.

Comptroller Williams drafted proposed legislation authorizing national banks located in towns of not over 3,000 population to act as insurance agents. *Id.* Senator Owen introduced the Comptroller's proposed legislation (changing the 3,000 figure to 5,000)[5] as an amendment to a banking bill already under consideration by the 1916 Congress. It was enacted without discussion or debate.

[5] This was the only apparent change from the Comptroller's proposal. 53 Cong. Rec. 11153 (1916). Senator Owen stated, "[t]he matter is unimportant either way." *Id.*

See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 113 S. Ct. 2173 (1993); 53 Cong. Rec. 11001, 11153 (1916). The provision states:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92 ("Section 92").[6]

[6] By requiring banks to act only for companies authorized to do business in the State in which the bank is located, Section 92 limits banks' agency authority. Even if state law permits properly licensed agents to sell insurance on behalf of so-called "unauthorized" or "non-admitted" companies (and most did at the time, and do now), as a matter of federal law, national banks cannot act as such "surplus lines" agents. Congress' motivation here presumably was to avoid the personal liability assumed by such an agent if the unauthorized company is unable to pay claims. *See* Spencer L. Kimball, *Insurance and Public Policy* 286-88 (1960). A similar motivation to avoid liability obviously animated other limitations

Contrary to the view of Petitioner's *amici*, Section 92 was *not* made part of the National Bank Act. *United States Nat'l Bank of Oregon*, 113 S. Ct. at 2186. Rather, Section 92 was buried in a statute that amended numerous sections of the Federal Reserve Act of 1913. *See* Act of Sept. 7, 1916, ch. 461, 39 Stat. 752. That Act "created Federal Reserve banks and the Federal Reserve Board and required the national banks formed pursuant to the [NBA] to become members of the new Federal Reserve System." *U.S. Nat'l Bank of Oregon*, 113 S. Ct. at 2180.

There has never been a federal licensing system, federal consumer protections applicable to Section 92 banks or branches, or federal regulations governing national banks' solicitation and sales activities.[7] Nor is there any evidence Congress intended to create a duplicate federal regulatory scheme for insurance agency activities of a few small-town national banks. The Office of the Comptroller of the Currency ("OCC") has neither the resources nor the expertise to duplicate state insurance regulatory schemes that have been in place for well over a century. To the contrary, Section 92's language itseif acknowledges that *States* regulate the insurance business. *See* 12 U.S.C. § 92 (permitting banks to act only for state-authorized insurance companies).

Section 92, as well as its legislative history, is silent as to its effect on state law. For more than three-quarters

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contained in Section 92—no guaranteeing premium payments or the accuracy of statements in applications for insurance. 12 U.S.C. § 92.

[7] The recently adopted *Interagency Statement on Retail Sales of Nondeposit Investment Products* (Feb. 15, 1994) (reproduced at OCC NR 94-21, 2-17-94), to which *amici* refer, ABA Br. at 29, relates to only one product regulated by the States as insurance—annuities. This Court has held that national banks' authority to sell annuities is founded in 12 U.S.C. § 24 (Seventh) and not confined to small-town national banks under Section 92. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995). Thus, the *Interagency Statement* has no bearing on national banks' exercise of their Section 92 authority.

of a century, national banks were routinely subject to state laws governing insurance agency activity, including those state laws, such as § 626.988, that limit or prohibit banks from selling non-credit insurance. Congress never altered this practice, despite having twice enacted legislation pertaining to Section 92 and having discussed the provision's existence on numerous occasions. *See United States Nat'l Bank of Oregon*, 113 S. Ct. at 2176.

C. Barnett Seeks to Sell Non-Credit Insurance in Florida.

Petitioner is not a small-town national bank, and is not the type of entity with which Comptroller Williams was concerned in proposing Section 92—"a country bank" having difficulty competing with state-chartered banks. 53 Cong. Rec. 11001 (1916). Petitioner is a subsidiary of the largest bank holding company in Florida and "one of the largest bank holding companies in the Southeastern United States." R3-62-4. Petitioner's principal offices are in a city with a population far exceeding 5,000, but it maintains an office in Belleview, Florida, whose population is under 5,000. R3-62-1-2.

At the behest of its holding company, Barnett purchased Linda Clifford Insurance, Inc., a general-lines insurance agency located in Belleview. R3-62-2-4. Linda Clifford and her associate agents immediately became employees of the bank and operated the agency as a division of the bank. R3-62-3. Barnett's stated intention was to sell insurance from this small-town branch office to customers located anywhere. R3-62-2.

The bank's claimed authority was the Comptroller's expansive interpretation of Section 92 as permitting a bank to sell insurance so long as it had a single branch office in a small town, even if its home office was in a large city. *See* 12 C.F.R. § 7.7100. The OCC took the further position that national banks could use this one small-town office as a launching pad for nationwide insurance sales. *See* OCC Interp. Ltr. No. 366 [1985-87

Tranfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). Barnett intended to exploit these broad interpretations, but Florida law stood in its way.

D. The Proceedings Below.

The same day it purchased the insurance agency, Barnett filed suit seeking a declaration that Section 92 preempts any Florida law that curtails its ability to sell a full line of insurance products in the State, and seeking to enjoin the Department from revoking the bank employees' insurance agency licenses. Respondents intervened as defendants and, together with the Department, responded that Florida law governs the bank's insurance activities.[8] After a bench trial at which representatives of the Department testified as to the purpose and function of § 626.988 in protecting Florida insurance policyholders, the District Court denied the bank the relief it requested. The Court held that, under the McCarran-Ferguson Act, § "626.988 is saved from preemption." 839 F. Supp. at 843, Pet. App. 35a.

The Eleventh Circuit unanimously affirmed. "Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in [*Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969)] that regulatory protection of policyholders may be indirect," the Eleventh Circuit agreed that § 626.988 regulates the business of insurance, within the meaning of McCarran, "because it protects policyholders." 43 F.3d at 636, Pet. App. 12a-13a. As the court explained, the danger § 626.988 seeks to avoid "is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured." *Id.* Section 626.988 "is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders." *Id.* (quotation omitted). The Eleventh Circuit then concluded that Section 92 neither "specifically relates to the business of insurance" nor, quoting *Fabe*, 113 S. Ct. at 2211, " 'specifically requires' . . . that apparently conflicting state laws be preempted." *Id.* at 637, Pet. App. 15a. The court accordingly concluded that § 626.988 need not yield to Section 92. *Id.*

[8] Respondents also filed counterclaims asserting that, even if Section 92 authorizes Barnett's sale of insurance, such sales may be made only in the small town in which the bank is located and doing business. The District Court dismissed these claims as moot and the Court of Appeals did not reach the issue. The issue would have to be addressed on remand were this Court to reverse.

SUMMARY OF ARGUMENT

This case will decide whether a simple federal authorization to some small-town national banks to sell insurance will eradicate well-established state regulation of insurance agents and their activities. At stake is not only whether national banks will be able to sell insurance throughout Florida by establishing one office in a small town—despite contrary state law—but whether they will be subject to the state regulatory prescriptions applicable to every other insurance agent in the State. For, although they struggle to suggest their view of preemption is tempered, Petitioner and its *amici* would displace any state law they deem impermissibly intrudes upon their purportedly indefeasible "right" to sell insurance. Despite its protestations to the contrary here, the OCC, asserting the preemptive effect of federal banking law, has expressly advised national banks that "[r]egardless of the form or subject of a regulatory scheme, a state 'cannot demand that a national bank *or its employees* be licensed.' "[9] There is absolutely no evidence the 1916 Congress that enacted Section 92 intended such a result, and every reason to believe the opposite result should obtain.

[9] OCC Interp. Ltr. No. 475 [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,012, at 71,119 (March 22, 1989) (emphasis in original).

There are two independent reasons why Section 92 does not preempt the state law at issue. First, there is no conflict between Section 92 and Fla. Stat. § 626.988. Accordingly, even without regard to the McCarran-Ferguson Act, § 626.988 is not preempted. Second, even if there were a conflict between Section 92 and § 626.988, McCarran precludes displacement of Florida law.

First. As its text and legislative history make clear, Section 92 permits small-town national banks the corporate *authority* to sell insurance in order to enable them to compete with state-chartered banks that have such power under state law. Absent that grant of authority, national banks would have been prohibited, under federal law, from selling insurance even in States where state law would permit them to act as insurance agents. But there is no suggestion in the text or legislative history of Section 92 that Congress wanted to give national banks an indefeasible *right* to sell insurance, immune from evenhanded state regulation. The 1916 Congress was merely permitting small-town national banks to participate in private business that was universally understood to be regulated exclusively by the States.

Indeed, the text of Section 92—by requiring national banks to act only on behalf of state-authorized insurance companies—expressly recognized state control of the insurance business. Because sale of insurance through agents who were not licensed by the State could result in revocation of the company's authorization, Section 92's express limitation gives States the ultimate power to decide whether national banks can sell insurance. There is no reason to believe Congress would not want to leave to the States the decision whether banks should be permitted to sell insurance in a particular locale, so long as the prohibition applies to both state and national banks. Indeed, Congress' enactment of McCarran reflects a considered judgment that States are better suited to make such determinations.

Preemption doctrine does not assume all federally granted powers are indefeasible rights. Even in the banking context, an inquiry must be made into Congress' purposes in enacting the law at issue. Because Section 92's purpose was to eradicate the disadvantage faced by small-town national banks whose state-chartered competitors could sell insurance, § 626.988—which treats national and state-chartered banks the same—does not stand as an obstacle to the accomplishment of Congress' objectives. Petitioner cannot unambiguously demonstrate Congress' "clear and manifest intent" to preempt § 626.988, and therefore cannot overcome the strong presumption against preemption.

Second. The McCarran-Ferguson Act, which was enacted by Congress to ensure the continuing primacy of the States in the regulation of the insurance industry, also precludes an interpretation of Section 92 so as to supersede § 626.988. Section 626.988 is a consumer protection provision that regulates licensed insurance agents. Such laws are designed to impact the manner in which insurance risks are transferred or spread by assisting potential policyholders to obtain reliable insurance, appropriate for their needs. As both courts below correctly concluded, by precluding licensed agents from affiliating with banks, Section 626.988 protects potential policyholders at a very basic level by insulating them from the unfair coercion that appears to be endemic when banks are permitted to solicit the purchase of insurance products from their banking customers. Under this Court's controlling precedent, § 626.988 was therefore enacted "for the purpose of regulating the business of insurance."

In contrast, neither Section 92 nor the Federal Reserve Act in which it is contained specifies a congressional design to impact the "business of insurance" otherwise reserved to the States in McCarran: the manner in which insurance risks are transferred or spread through the insurer-insured relationship. The sole purpose of Section

92 is to provide an additional source of revenue for small-town national banks through the mechanism of additional charter authority—authority States could not, under any circumstances, grant. For this reason, Section 92 does not "specifically relate to the business of insurance" and it may not be construed to invalidate, impair, or supersede Section 626.988.

ARGUMENT

I. SECTION 92 DOES NOT PREEMPT § 626.988 UNDER TRADITIONAL PREEMPTION ANALYSIS.

Petitioner and the Comptroller dismiss the argument that Section 92 does not displace § 626.988 under traditional preemption analysis, and move directly to attack the Eleventh Circuit's holding under McCarran. But this Court need not reach the McCarran issue because, even under "ordinary" preemption doctrine, § 626.988 is not preempted.[10]

A. There Is a Strong Presumption That Congress Did Not Intend Section 92 to Preempt § 626.988—a Presumption That Can Be Overcome Only With "Unambiguous" Evidence to the Contrary.

Preemption is always a question of congressional intent: did Congress intend to preclude the application of state law? *E.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). And "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did *not* intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (emphasis added). Preemption, therefore, is not favored "in the

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[10] Contrary to the OCC's statement, neither court below "acknowledged that the state and federal laws are in irreconcilable conflict." OCC Br. at 8 (citations omitted). The courts merely noted that there was an "alleg[ed]" (Pet. App. 6a) or "assert[ed]" (*Id.* at 24a) conflict between Section 92 and § 626.988. Although the issue was fully presented and argued, neither court reached the traditional preemption question given their McCarran holdings.

absence of persuasive reasons." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

These general constraints are heightened in this context. "[I]n cases like this one, where federal law is said to bar state action in fields of traditional state regulation, *see Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985), [the Court has] worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress.*' *Rice* [*v. Santa Fe Elevator Corp.*, 331 U.S. 218,] 230 [(1947)]." *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995) (emphasis added) (citing numerous cases). Accordingly, this Court cannot "conclude that Congress legislated the ouster of [Florida law] in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers*, 373 U.S. at 146-47.

Because Section 92 contains no express preemption provision, Congress' preemptive intent, if any, must be inferred. And this Court has been "reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Since Congress has not entirely displaced state regulation of national banks, *supra*, at 7-8, it is clear that Congress intended Section 92 to preempt state law, if at all, only to the extent the state law "actually conflicts with federal law." *Cipollone*, 505 U.S. at 516. "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough*, 471 U.S. at 713 (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Petitioner must present a "clear and manifest," "unambiguous" showing of conflict "that is strong enough to overcome the presumption that state and local regu-

lation . . . can constitutionally coexist with federal regulation." *Id.* at 716.

B. Petitioner Cannot Demonstrate That Preemption Was the "Clear and Manifest Purpose of Congress."

Petitioner cannot "overcome the presumption against finding pre-emption of state law." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). As both Petitioner and the OCC recognize, the only possible basis for a finding of preemption here would be if Section 626.988 impermissibly interferes with the purposes of Section 92. See Petr. Br. at 15; OCC Br. at 9.[11] Because there is no dispute "that Section 92 permits small-town national banks . . . to sell insurance," Petr. Br. at 14, the fundamental question is whether the *purpose* of that grant of permission was "to create an 'option' in the strong sense of that word: that Congress intended to create a legal *right* to [sell insurance], a right immune from significant state interference." *Massachusetts Medical Soc'y v. Dukakis*, 815 F.2d 790, 792 (1st Cir.) (Breyer, J.), *cert. denied*, 484 U.S. 896 (1987).[12] Section 92 cannot be read to confer on small-town national banks such a *right*—as opposed to the mere *power*—because

[11] Compliance with both statutes is not a "physical impossibility." No one argues there are conflicting legal obligations placed on national banks by the two provisions. *Compare Davis v. Elmira Sav. Bank*, 161 U.S. 275, 284 (1896).

[12] In *Massachusetts Medical*, the First Circuit concluded that there was no clear and manifest evidence that Congress intended a provision of the federal Medicare Act that permits physicians to "balance bill" to preempt a Massachusetts law prohibiting the practice. The court reasoned that Congress' decision not to ban balance billing did not necessarily translate into a federal prohibition against state regulation of the practice. 815 F.2d at 794. The congressional decision to permit, the court explained, "is perfectly consistent with later decisions by individual states to regulate balance billing on their own." *Id.; accord Pennsylvania Medical Soc'y v. Marconis*, 942 F.2d 842 (3d Cir. 1991).

Petitioner cannot demonstrate that "Congress has *unmistakably so ordained.*" *Florida Lime & Avocado Growers*, 373 U.S. at 142 (emphasis added).

1. Neither the text, historical context, nor the legislative history of Section 92 indicates Congress' "unmistakabl[e]" purpose to create a right immune from evenhanded state regulation.

The language of Section 92 suggests Congress did not intend to confer a right valid against state prohibition. Section 92 "nowhere includes the word 'right' or any other language suggesting creation of a right immune from state interference." *Massachusetts Medical*, 815 F.2d at 794. Neither the statute nor its legislative history states, for example, that small-town national banks "may sell insurance all state laws to the contrary notwithstanding."

In 1916, some States statutorily prohibited banks from acting as insurance agents,[13] but neither the text nor the legislative history of Section 92 even hints at any intent to preempt those state laws. Nor is there any evidence Congress intended small-town national banks to operate outside the States' insurance regulatory scheme, without state licensure—a proposition that itself would require preempting state licensing requirements. Given that this area of regulation was well-recognized as exclusively one of state control, and that state regulation was well-developed at the time, preemptive intent "would have seemed significant and unusual enough to have warranted

[13] For example, Wisconsin, along with other States, prohibited corporations from acting as insurance agents. Morton Keller, *The Life Insurance Enterprise, 1885-1910*, at 258 (1963). Relying upon this statutory prohibition, the Wisconsin Attorney General ruled in 1917 that a national bank could not act as agent for an insurance company, despite Section 92. Kimball, *supra*, at 119-20.

mention." *Massachusetts Medical,* 815 F.2d at 794.[14] Congress' utter silence on the question whether Section 92 conferred a right to sell insurance valid against state interference is strong evidence that it did *not* intend Section 92 to have preemptive effect. *Cf. CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 86 (1987) ("The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws . . . , it would have said so explicitly.").

Indeed, the text of Section 92 itself recognizes state regulation of national banks' agency activity. Section 92 permits national banks to act as agent only for companies the *State* has authorized to do business. 12 U.S.C. § 92. This restriction necessarily entails the requirement that the national bank itself become licensed by the State. When Section 92 was enacted, virtually every State, if not all States, prohibited the sale of insurance through an agent who was not licensed by the State. *See* Patterson, *supra,* at 161 (citing civil and criminal penalties for violation). Selling insurance through unlicensed agents was grounds for rescission of the company's state-issued authorization. *Id.* at 133 & n.73, 154 & n.182 (citing state statutes). Thus, if the bank (or its employees) were not licensed by state insurance authorities, insurance sales by the banks could result in loss of authorization for the insurance company; hence the national bank, under the *express terms* of Section 92, would be precluded from acting as its agent. In other words, Section 92 gave States the ultimate power to decide whether national banks could sell insurance.

Moreover, the historical context and legislative history persuasively demonstrate that it was not Congress' intent to grant small-town national banks a right to sell insurance that would operate to supersede state laws that prohibit state and national banks alike from acting as agent. As Petitioner recognizes, Section 92's legislative history makes clear that the statute was proposed and enacted to permit small-town national banks to take advantage of " 'additional sources of revenue' to 'place them in a position where they could better compete with local State banks and trust companies.' " Petr. Br. at 3 (quoting 53 Cong. Rec. 11001 (1916)). The competitive problem arose, the Comptroller explained in the very sentence Petitioner quotes, because state banks "[we]re sometimes authorized under the law to do a class of business not strictly that of commercial banking." 53 Cong. Rec. 11001 (1916).

[14] Only two years earlier, unsuccessful proposals had been made to amend the Constitution to enable Congress to regulate the business of insurance, which clearly was understood to include the licensing of agents. *Supra,* at 4.

Absent federal legislation, however, national banks could not similarly take advantage of non-banking business opportunities. By 1916, it was "settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established." *California Bank v. Kennedy,* 167 U.S. 362, 366 (1897) (citing *Logan County Nat'l Bank,* 139 U.S. at 73). And, as Comptroller Williams explained, national banks were "not given either expressly nor by necessary implication the power to act as agents for insurance companies." 53 Cong. Rec. 11001 (1916). It was "universally understood that no national banks possessed any power [under federal law] to act as insurance agents." *Saxon v. Georgia Ass'n of Indep. Ins. Agents,* 399 F.2d at 1013 (emphasis in original).

Section 92 was proposed to rectify this competitive disadvantage. It augmented small-town national banks' charter authority so that they "may be permitted to act as agents for insurance companies in the placing of policies of insurance." 53 Cong. Rec. 11001 (1916). Thus, it was no longer *ultra vires* under federal law for these national banks to sell insurance. As the OCC stated as

recently as 1985, Section 92 does no more than "authoriz[e] some activities for small town banks that would otherwise be impermissible" as a matter of federal law. OCC Interp. Ltr. No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,776 (Apr. 4, 1985). But by removing this limited insurance activity from the more general *federal* bar to non-banking activities by national banks, Congress did not express an intent to preempt the *States'* traditional power to regulate insurance conduct within their small towns.

Thus, the purpose of Section 92 was to place small-town national banks on more equal footing with state-chartered banks—to ensure they would not be disadvantaged.[15] *See also Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954) (noting that Congress expanded national banks' federal charter powers over time so "[t]hat these federal institutions may be at no disadvantage in competition with state-created institutions"); *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133 (1969) (noting that "[t]he policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system"); *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (noting Congress' "policy of equalization [between state and national banks] first adopted in the National Bank Act of 1864"). Section 92 advanced that purpose by permitting national banks to engage in an area of commerce that was, at the time, believed to be one of exclusive state control. States alone

[15] Because the bill's sponsor, Senator Owen, adopted the 1916 Comptroller letter as the sole justification for Section 92's enactment, it "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *accord Zuber v. Allen*, 396 U.S. 168, 192 (1969). In addition, as a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," the 1916 Comptroller statements are entitled to great weight. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933); *accord Mountain States T. & T. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985).

licensed insurance agents, set standards for their qualifications, and regulated their agency activities.[16] A state law —like Section 626.988—that evenhandedly restricts the ability of state and national banks to sell insurance does not stand as an obstacle to Congress' objective that small-town national banks not be placed at a competitive disadvantage relative to state-chartered banks.

2. *The evidence suggests Congress did not want national banks to sell insurance where state banks were prohibited from doing so.*

Because it is Petitioner's heavy burden to demonstrate unambiguous congressional intent to preempt such evenhanded state laws—a burden that Petitioner has not even attempted to satisfy—Respondents need not establish that Congress affirmatively intended *not* to preempt such laws. However, a consideration of the full probable purposes animating Section 92 suggests Congress could well have intended that small-town national banks *not* enjoy the right to sell insurance in those States that restricted or prohibited the sale of insurance by banks generally.

Congress' decision to limit Section 92's grant of power to sell insurance to *small-town* national banks indicates that Congress considered such authority to be, at best, a necessary evil. Comptroller Williams explained there were significant costs involved in allowing banks to sell insurance—resulting in banks becoming "department stores" and diverting bankers' attention from "the legitimate business of banking [that] affords ample scope for the energies of trained and expert bankers." 53 Cong. Rec. 11001 (1916). But the Comptroller believed the costs were outweighed by the potential benefits in the narrow context of small national banks in country towns and villages. Those banks were experiencing competitive disequilibrium

[16] This is not to say Congress lacked the constitutional authority to grant national banks the federal charter capacity to sell insurance. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Congress has implied power to charter national banks to implement its fiscal powers).

produced when local state-chartered banks were permitted to engage in some non-banking activities (sale of insurance and brokerage of real estate loans).[17] So long as small-town national banks could engage in those same activities, there was no reason to believe they would be at a competitive disadvantage. *See id.* Conversely, Congress could anticipate that if a State determined its small-town banks should *not* sell insurance, evenhanded application of that same prohibition to both national and state banks would not place the former at a relative disadvantage.

There is no evidence Congress thought small-town national banks were in such precarious financial position that they needed the absolute right to sell insurance, even in those States that determined small-town banks should not engage in such activity. Insurance sales authority was never deemed to be an "incidental power necessary to carry on the business of banking" under Section 24 (Seventh) of the National Bank Act. *See supra*, at 8, 21. And Congress did not include the additional authority among the banking powers enumerated in Section 24; indeed, it did not include Section 92 in the National Bank Act at all. *See United States Nat'l Bank of Oregon*, 113 S. Ct. at 2186. The Comptroller does not contend a national bank small-town office's exercise of its Section 92 authority is "critical to 'the financial stability of the association.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (citation omitted). There is no evidence Section 92 is a source of authority "essential to the economic soundness of the [national bank] industry," *id.*, or that any of national banks' *banking* "functions, especially as a source for federal credit, depend upon their success" in selling insurance. *Franklin Nat'l Bank*, 347 U.S. at 375.

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[17] As originally proposed by Comptroller Williams and enacted, Section 92 also permitted small-town national banks to broker real estate loans. That provision was repealed in 1982. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, Tit. IV, § 403(b), 96 Stat. 1511.

In fact, for three-quarters of a century—from 1916 until the 1980s—national banks were routinely subject to state-law limitations on the exercise of their Section 92 powers. And a majority of States place some restriction on the ability of banks to sell insurance. There is no evidence national banks suffered or refused to locate or closed in those States during this period, or that residents of small towns in those States had difficulty obtaining banking services.[18]

The decision whether the potential harm of banning banks from selling insurance outweighs its potential good is obviously complicated, and history has demonstrated that the answer will vary from State to State. Petitioner "provides no convincing theoretical or logical reason why Congress would not, or could not, have wanted to leave such a decision to the states. After all, a state is ordinarily as concerned as the federal government to see that its . . . citizens enjoy [the services they need]. A state would not normally wish to impose a ban that would hurt those citizens more than it helped them. Indeed, a state would likely be *more* cautious than the federal government." *Massachusetts Medical*, 815 F.2d at 795 (emphasis in original). "Moreover, to the extent that relevant economic conditions vary from state to state, an individual state may better be able to strike the balance" in a way that best serves its citizens. *Id.*

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[18] Even assuming that it is important for the survival of small-town national banks to obtain fees from insurance sales, there are numerous ways in which banks can obtain fee income short of acting as agent. For example, national banks may lease office space to insurance agencies or may purchase group policies and market them to their banking customers, collecting fees for administrative services. National banks are widely utilizing these powers even in States that would not permit bank employees to act as agents. Furthermore, every State permits banks, including national banks, to sell credit-related insurance. This activity generally permits banks to collect extremely high commissions, and lending institutions have captured nearly 100% of the market.

Indeed, Congress' enactment of the McCarran-Ferguson Act is a concrete manifestation of its belief that the States *are* better situated to make decisions regarding the conduct of the insurance business—regardless of what entities are involved: "One of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *FTC v. Travelers Health Ass'n*, 362 U.S. at 302; *see also Hartford Fire Ins. Co. v. California*, 113 S. Ct. at 2901; 91 Cong. Rec. 1087 (1945).

C. Petitioner's View That All Grants of *Power* to National Banks Are Necessarily Indefeasible *Rights* Is Manifestly False.

Contrary to Petitioner's assertions, the conclusion that Congress did not intend Section 92 to preempt state law is not a novel result. *See* Petr. Br. at 12. This Court has often held that a federal authorization was not intended to confer an absolute right and thus does not conflict with state law that prohibits or limits the same activity. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Res. Con. & Dev. Comm'n*, 461 U.S. 190 (1983) (holding Atomic Energy Act, which authorizes and regulates the construction of nuclear powerplants, does not preempt state law prohibiting the construction of such plants); *id.* at 205-06 (noting Act "does not at any point expressly require the States to construct or authorize nuclear powerplants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 131-32 (holding state law prohibiting price discrimination in situations where discrimination would be permitted by Clayton Act, as amended by Robinson-Patman Act, creates no conflict because the federal law was not intended to create a "right" to discrim-

inate); *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 280-81 (1977) (construing federal fishing licenses, which confer the " 'authority to licensed vessels to carry on' the activity [of fishing]," to be consistent with state-law restrictions that treat federal licensees the same as state residents); *see also, e.g., Pennsylvania Medical Soc'y v. Marconis*, 942 F.2d 842 (3d Cir. 1991); *Massachusetts Medical, supra.*

The fact that Section 92 involves national banks does not dictate a contrary result. Although the familiar distinction between "powers" and "rights" [19] makes clear that a federal grant of authority is not necessarily frustrated by a state law prohibiting the exercise of that authority, Petitioner appears to contend that all national bank powers are inherently indefeasible rights. *See* Petr. Br. at 15. If Petitioner means to suggest that all powers conferred upon national banks are ipso facto rights that cannot be negated by state restrictions, its claim is belied by the very cases Petitioner cites: *de la Cuesta* and *Franklin National Bank.* Those cases demonstrate that this Court has always recognized that whether a state law that forbids a national bank to exercise an express power conflicts with the federal statute depends entirely upon the congressional purpose behind the particular authorization. It is, in other words, a matter that demands *interpretation* of the particular federal statute at issue.

De la Cuesta involved a challenge to the validity of a state law that barred S&Ls from using due-on-sale clauses in their loan agreements despite a federal regulation that expressly authorized S&Ls to employ such provisions. The Court held the state law was preempted because it found "unambiguous" the federal intent to preempt. 458 U.S. at 154. This was so both because the historical context demonstrated that the regulation was implemented amidst "increasing controversy" over the

[19] *See generally* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913-14).

precise question whether S&Ls could exercise the clause in the face of state restrictions, and because of clearly stated expression of preemptive intent. *See id.* at 145-47.

In *Franklin National Bank*, the Court concluded that national banks' ability to attract deposits was critical to their functioning as a source of federal credit, 347 U.S. at 375, and that their ability to use the word "savings" in advertisements was "one of the most usual and useful of weapons" in competition, *id.* at 376. The Court thus read the NBA as "declaratory of the *right* of a national bank to enter into or remain in [the business of receiving savings deposits]" and of the "*right* to let the public know about it" by using the word "savings." *Id.* at 377-78 (emphasis added). In short, the Court held the state law prohibition on use of the word "savings" except by certain state-chartered banks was preempted because it interfered with an "incidental power . . . necessary to carry on the business of banking.'" *Id.* at 376 (quoting 12 U.S.C. § 24).

Lower federal courts have recognized that both *de la Cuesta* and *Franklin National Bank* proceeded on the understanding that whether a particular federal grant of capacity to national banks is to be construed as an indefeasible right requires a case-by-case inquiry into the particular congressional purpose animating that grant of power. *See Pennsylvania Medical*, 942 F.2d at 856-57; *Massachusetts Medical*, 815 F.2d at 796. Indeed, this simple truth follows necessarily from the more general proposition—recognized in national bank cases as elsewhere—that the existence of a preemptive conflict between state and federal law turns upon congressional intent. *See, e.g., Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875) ("The point to be sought is the intent of the law making power.").

Moreover, in other decisions, the Court has relied upon evidence of congressional intent to conclude that particular powers conferred upon national banks were *not* intended to be indefeasible rights, and therefore do not preempt superficially conflicting state law. *See, e.g., First*

Nat'l Bank v. Dickinson, 396 U.S. at 138 (rejecting "a systematic attempt to secure for national banks . . . privileges which Florida denies to competing state banks," and holding that Florida could bar national banks, along with state banks, from operating, *inter alia*, an armored car service); *McClellan v. Chipman*, 164 U.S. 347 (1896) (holding that the power of national banks to hold and convey real estate for purposes specified by federal law is subject to prohibitions on the transfer of property imposed by nondiscriminatory state law).

All of the cases upon which Petitioner and its *amici* rely in which the Court has concluded that a federal authorization to national banks preempts restrictive state law concern national banks' *banking* powers. It is absolutely clear that Congress intended, in enacting the NBA, to create a banking system separate and apart from the state banking system. *Supra*, at 7 & n.4. It was precisely the desire to depart from a state-controlled monetary system that led Congress to establish national banks. *Id.* Thus, this Court has repeatedly said state laws cannot restrict national banks' core banking activities—the very reason they were created. To do so would frustrate clear congressional intent to establish a "dual" banking system. Nonetheless, in certain circumstances, Congress has expressly indicated that national banks' banking activities are subject to state regulation. The absence of such reference in Section 92 is not surprising, considering its subject matter is not banking activities but rather the authorization to participate in private commerce that was *exclusively* regulated by the States. Consequently, the fact that the text of Section 92 does not more explicitly condition its grant of authority on compliance with all state regulations is "[f]ar from the compelling congressional direction on which pre-emption in this case would have to be predicated." *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 540 (1979).[20]

* * * *

[20] The *Franklin* decision itself recognized that, even as to national banks' exercise of their *banking* powers, federal law need

In sum, Section 626.988 presents no obstacle to the realization of Congress' purpose in enacting Section 92: to empower small-town national banks to meet competition from state-chartered banks that were authorized by state law to sell insurance. Section 626.988 simply levels the playing field between state-chartered and national banks. Allowing States to restrict equally the insurance sales activities of state and national banks does not undermine the ability of national banks to provide banking services, the reason for their creation. Put otherwise, Petitioner cannot overcome the strong presumption against preemption and demonstrate that Section 92 confers a "right" in the strong sense as to which § 626.988 creates an "obstacle." [21] There is no evidence of Congress' "clear and manifest intent" to preempt.

not expressly preserve state authority to regulate the bank in order for state law to apply. *See* 347 U.S. at 378 n.7. As noted *supra*, the text of Section 92 does expressly contemplate continued state regulation of insurance agents, and does limit its grant of authority to sales on behalf of state-authorized insurance companies.

[21] Because the preemption question is a pure question of law that does not implicate "practical agency expertise," which is "one of the principal justifications behind *Chevron* deference," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990), the OCC does not attempt to contend that its opinions on the issue are entitled to deference. Indeed, a federal statute's failure to speak on the preemption issue does not create "a statutory 'gap' within the meaning of *Chevron* . . ., that Congress intended [the agency] to fill." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Moreover, "[a] precondition of deference under *Chevron* is a congressional delegation of administrative authority," *id.*, of which none has been made here. *Compare* 12 U.S.C. §§ 36(f)(1)(A)(ii), 43 (delegating authority to the Comptroller to determine the applicability of state laws to interstate bank branching operations and establishing notice and comment procedures). Given the necessity of reconciling Section 92 with McCarran—a statute that falls well outside the Comptroller's purview—the absence of such a delegation is especially pertinent here. Finally, even if none of the above were true, the OCC has failed to issue any formally promulgated regulations to which deference would be appropriate here. *See Hillsborough County*, 471 U.S. at 718 (concluding that

II. THE McCARRAN-FERGUSON ACT ALSO MANDATES THAT SECTION 92 NOT BE DEEMED TO SUPERSEDE SECTION 626.988.

If the Court determines Section 92 would preempt § 626.988 under a traditional preemption analysis, it must then determine whether the McCarran-Ferguson Act mandates that Florida law should nevertheless apply to national banks. McCarran imposes a "reverse preemption" rule affirming "the supremacy of the States in the realm of insurance regulation." *Fabe*, 113 S. Ct. at 2207. In seeking to preserve this exclusive state domain, McCarran "overturn[ed] the normal rules of preemption" for state laws that regulate the "business of insurance." *Fabe*, 113 S. Ct. at 2211. Because § 626.988 was enacted by Florida "for the purpose of regulating the business of insurance," McCarran mandates that Section 92—a federal provision that does *not* "specifically relate to the business of insurance"—not be construed to "invalidate, impair, or supersede" that state law.

A. Section 626.988 Was Enacted "for the purpose of regulating the business of insurance."

As both the Petitioner and the OCC concede, the scope of the first clause of McCarran's Section 2(b) is very broad and encompasses all state laws that have the "end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Fabe*, 113 S. Ct. at 2210 (citation omitted); *see* Petr. Br. at 25, 36; OCC Br. at 10.[22] Relying on the Court's decision in *SEC v. National*

courts can expect agencies to make clear in their *regulations* when federal law governs exclusively).

[22] This Court has specifically distinguished the broad general immunity from preemption by *any* federal law conferred in the first clause of Section 2(b), from the much narrower immunity from preemption by federal *antitrust* law conferred in the Section's second clause:

> [T]he first clause of § 2(b) was intended to further Congress' primary objective of granting the States *broad* regulatory authority over the business of insurance. The second clause

Securities, the Court in *Fabe* held that this test is satisfied by state laws " 'aimed at protecting or regulating th[e] relationship' " between the insurer and the insured. 113 S. Ct. at 2208 (quoting *National Securities*, 393 U.S. at 460).[23]

Applying this standard in *National Securities*, the Court ruled that state laws pertaining to "[t]he selling and advertising of policies, and the licensing of companies and their *agents* . . . are . . . within the scope of [McCarran]." 393 U.S. at 460 (citing *FTC v. National Casualty Co.*, 357 U.S. 560 (1958) (*per curiam*), and *Robertson v. California*, 328 U.S. 440 (1946)). In making this observation, the Court discussed McCarran's focus:

> [I]t is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

National Securities, 393 U.S. at 460.

As the Court explained in *Robertson* in concluding that insurance agent licensing laws fall within McCarran, such laws are

> designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

> accomplishes Congress' secondary goal, which was to carve out only a *narrow* exemption for "the business of insurance" from the federal antitrust laws.

Fabe, 113 S. Ct. at 2210 (citations omitted) (emphasis added).

[23] The dissent would have applied the same test, but would have reached a different result only because, in its view, the state law at issue did not regulate the relationship between the insurer and the insured. *See Fabe*, 113 S. Ct. at 2213-17 (Kennedy, J., dissenting).

328 U.S. at 447.[24] Such licensing laws, like laws governing the solicitation and sale of insurance policies, protect the insurer/insured relationship by attempting to ensure that prospective policyholders obtain reliable insurance that best meets their needs. In this way, the state laws directly impact the "spreading or transfer of risk" on which the Court focused in crafting a definition of the "business of insurance" in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).[25] *See* Macey & Miller, *supra*, at 25 (McCarran "extends to a broad range of activities for which an insurance company or agent would need to obtain a license under state law").

In asserting that Florida's prohibition on licensed agents' affiliation with banks was not "enacted for the purpose of regulating the business of insurance," Petitioner postulates that licensing laws do

> not concern the relationship between insurer and insured, the type of insurance policy that is issued, the rights and obligations of the parties to the insurance contract, or the interpretation and enforcement of such a policy.

Petr. Br. at 36. Similarly, the OCC opines that licensing and unfair trade practices regulations such as § 626.988 do "not affect how the insurance business is conducted in Florida." OCC Br. at 10. But Petitioner and its *amici* completely ignore the vital role, recognized by this Court

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[24] *See also* John A. and Jean Appleman, *Insurance Law and Practice* § 8632, at 5 (rev. ed. 1981) (licensing laws are enacted "to protect the public from surrendering its money in exchange for questionable or worthless pieces of paper denominated insurance policies").

[25] In *Royal Drug* and *Pireno*, the Court, in the course of analyzing whether the state laws at issue were preempted by federal antitrust laws under the *second* clause of Section 2(b), identified three factors useful in examining whether a given practice is within the "business of insurance." Both the majority and the dissent in *Fabe* indicated that these factors have some role in analysis under the first clause of Section 2(b). *See* 113 S. Ct. at 2208; *id.* at 2216 (Kennedy, J., dissenting).

in *National Securities, National Casualty Co.*, and *Robertson*, that laws regulating the marketing and sale of insurance—including agent licensing regulations—play in increasing the expected reliability and appropriateness of insurance policies that are ultimately purchased. This omission is fatal to their arguments.

1. *The purpose of the Florida law is to protect policyholders.*

Petitioner's and its *amici*'s assertions that the purpose of § 626.988 is directed at something other than the protection of policyholders and the insurer-insured relationship are misplaced. *First*, Section 626.988 is part of a comprehensive regulatory scheme designed to insulate the insurance consumer from sales practices the State deems unfair. The Florida Legislature deliberately placed § 626.988 in the Unfair Insurance Trade Practices Act.[26] As the "Declaration of Purpose" of that Act states:

> The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) [McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Fla. Stat. § 626.951(1). A "policyholders' bill of rights" also included within the Act further delineates the underlying purposes by identifying the principles that should guide the Department in applying all its substantive terms. These rights include:

> (a) . . . the right to competitive pricing practices and marketing methods that enable them to determine the best value among comparable policies.
>
> * * *

[26] *See* Fla. Laws 1976, c. 76-260; Fla. Laws 1974, c. 74-35, § 1.

> (c) . . . the right to insurance advertising and other selling approaches that provide accurate and balanced information on the benefits and limitations of a policy.
>
> * * *
>
> (e) . . . the right to be serviced by a competent, honest insurance agent or broker. [and]
>
> * * *
>
> (g) . . . the right to an insurance company that provides an economic delivery of coverage and tries to prevent losses.

Fla. Stat. § 626.9641(1). In addition to the prohibition on insurance agent affiliations with banks, the Act proscribes a broad array of other unfair trade practices including misrepresentations in advertising, *id.* § 626.9541 (1)(a), providing other false information, *id.* § 626.9541 (1)(b), making insurance transactions through credit card facilities, *id.* § 626.9541(1)(q), and various forms of discrimination.[27] The obvious and stated intent underlying the proscription of all of these practices is to free insurance consumers from misleading and coercive influences in an effort to permit them to make the most informed, reliable, and appropriate purchase choice possible.

Second, Florida courts have unequivocally concluded that § 626.988 was enacted for the purpose of protecting insurance policyholders by preventing unfair and deceptive trade practices by banks, undue concentration of resources in banks, and harm to Florida insurance consumers through such forces as indirect and direct bank coercion. *See Glendale Fed. Sav. & Loan Ass'n v. State Dep't of Ins.*, 587 So. 2d 534, 535 n.1 (Fla. Dist. Ct. App. 1st Dist. 1991), *rev. denied*, 599 So. 2d 656 (Fla.

[27] Section 626.988 is thus not a mere "pin-pointed" exclusion. *See* Petr. Br. at 33. Even if § 626.988 were an isolated prohibition, however, McCarran would apply on its own terms as it protects "*any law* enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (emphasis added).

1992); *Production Credit Ass'ns v. Department of Ins.*, 356 So. 2d 31, 32 (Fla. Dist. Ct. App. 1st Dist. 1978) ("The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest."). Contrary to Petitioner's suggestion, these conclusions were not speculative; the state courts found these were the statute's actual goals.[28] The federal question whether a particular state law was "enacted for the purpose of regulating the business of insurance" turns on the "design[]" or "goal[]" of the state law, *Fabe* 113 S. Ct. at 2212, which is an issue of *state* law. *E.g., Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion). Thus, the fact that Florida courts have consistently held that § 626.988 was enacted to protect policyholders demonstrates it was enacted "for the purpose of regulating the business of insurance."

Third, two Department officials who have been primarily responsible for enforcing and promulgating regulations under § 626.988 over the last fifteen years gave uncontroverted testimony confirming the validity of each of the concerns identified in the body of the Unfair Insurance Trade Practices Act and by the *Glendale* and *Production Credit* courts, and demonstrating how the statute works to protect policyholders by alleviating each of these concerns.[29] They each testified, for example, that

[28] It is irrelevant that the *Glendale* findings were in the context of an equal protection challenge. A state court's legal determination regarding a state-law issue is not limited to the particular federal-law context in which it is made. *See, e.g., Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989). Moreover, the *Production Credit* decision was solely in the context of interpreting § 626.988's reach.

[29] The experience of those responsible for administering, enforcing, and promulgating regulations under a statute are valuable in interpreting the statute. *See, e.g., Doe v. City of Butler*, 892 F.2d 315, 324 (3d Cir. 1989); *Deshotels v. SHRM Catering Servs., Inc.*, 845 F.2d 582, 585 (5th Cir. 1988); *Glendale*, 587 So. 2d at 585 n.1.

the statute prevents coercion by recognizing the inherently coercive power of a situation in which the institution extending credit is also the institution marketing insurance. *See* R5-23, 77 (testimony of Messrs. Dowdell and Shropshire); *see also* Br. for Resps. Bill Nelson, *et al.* at Point I-E (further discussing this trial testimony and its significance).[30]

2. *The fact that § 626.988 is exclusionary does not disqualify it as "regulation."*

The OCC initially concedes that "[g]enerally applicable education, experience, or financial responsibility requirements for obtaining an insurance agency license would" constitute sales and licensing regulations within the ambit of McCarran. OCC Br. at 12. The OCC further concedes that at least some categorical exclusions from agent licensure would fall within McCarran. *Id.* at 13. Indeed, the OCC's only condition on such exclusions is that they be "relevant to the protection of present or potential policyholders." *Id.* Because § 626.988 is designed for, and serves, just such a purpose, it satisfies the OCC's test.

Petitioner, however, disagrees with that test. It takes a more categorical position, arguing that excluding an entity from selling insurance cannot constitute regulation of the business of insurance. Petr. Br. at 20-22. According to Petitioner, any such exclusion is the "regulation" of the excluded entity—here the regulation of banks. *Id.* (citing *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388,

[30] Despite this evidence, Petitioner argues § 626.988's "real purpose" was to protect insurance agents from competition, and relies solely on one small portion of the preamble to the bill that was rejected by the Florida Legislature prior to passage. *See* Petr. Br. at 18-19. Even if the preamble were evidence of the enacting Legislature's purpose, it would only further demonstrate that § 626.988 was designed to protect policyholders by eliminating coercive forces that could induce potential policyholders to accept insurance policies ill-suited to their needs. *See* Petr. Br. App. at 5a-7a (reproducing the preamble).

392 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3069 (U.S. July 13, 1995) (No. 95-74), Pet. App. 48a). As common sense dictates, however, "State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit." *Dexter v. Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233, 236 (2d Cir. 1975); *accord In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1557 n.9 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

This Court has been neither "able [n]or willing to draw lines by calling a law 'prohibitory' or 'regulatory.'" *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). Thus the Court has repeatedly refused to accept "exclusion does not constitute regulation" arguments. *E.g., Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954) (viewing exclusion of felons from licensed activity as regulation of activity, not of felons); *Williamson v. Lee Optical*, 348 U.S. 483, 490-91 (1955) (viewing exclusion of eye examiners from retail merchandise space as regulation of optometry). Indeed, in the insurance context, this Court has held that excluding undertakers from the sale of life insurance is a permissible regulation of that business. *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949). The *Daniel* Court concluded that such state-law exclusion is designed to further the interests of purchasers of insurance. *Id.* at 222-23. Florida's exclusion of banks from selling insurance is animated by the same goal.

3. *Section 626.988 is not aimed at regulating banks or the business of banking.*

Finally, Petitioner and its *amici* contend § 626.988 really regulates the "business of banking" because: (1) the coercion being prevented is in the banking relationship; (2) other laws already prevent banks from tying insurance to bank products; and (3) § 626.988 does not foreclose all banks from selling all forms of insurance. Each argument is unfounded.

First, although Petitioner appears not to question that the Florida Legislature's purpose in enacting § 626.988 was to prevent bank coercion of its customers (through tying or otherwise), it erroneously claims such prevention is the regulation of the business of *banking*. *See* Petr. Br. at 22; OCC Br. at 6, 16. Section 626.988 is not concerned with banks' marketing of their banking products. Section 626.988 is animated by the concern that banks' control of credit will induce Florida residents to purchase insurance from the bank that is not needed by or suited to the customer. Even if bank insurance agents do not overtly tie insurance products to banking products, insurance customers will believe they should purchase insurance from the bank to solidify their credit relationship. It is only in banks' role as *insurance agents* and bank customers' role as *insurance policyholders* that § 626.988 seeks to "control the relationship between banks and their Florida customers." Petr. Br. at 21. *See Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d at 235 (rejecting "[t]he argument that the tying of insurance policies to mortgage loans is not 'the business of insurance'") (relying on *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975)).

Second, the fact that general statutes may prohibit express, overt tying does not mean the Florida Legislature cannot make an informed judgment that certain lending settings are inherently coercive and should not be available as a venue for insurance sales. As the District Court below recognized,

> *notwithstanding the existence of specific prohibitions on coercive credit extension*, . . . loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer, and the insurance agents.

839 F. Supp. at 842 (emphasis added), Pet. App. 31a. Unlike those other statutes, § 626.988 addresses non-overt coercion and circumstances in which customers "voluntarily" tie because of a belief it will better their credit relationship with the bank. Unlike those other statutes, § 626.988 is prophylactic.

Third, the Florida Legislature's creation of certain exceptions does not undermine its policyholder protection purpose.[31] The exceptions primarily address insurance sales practices in which banks were already engaged, the discontinuance of which the Legislature believed would pose an unfair hardship. *See Glendale*, 587 So. 2d at 537. As to permitting banks to sell credit-related insurance, by the early 1970s banks were the *only* entities providing credit insurance and the Legislature could conclude it was a legitimate means of protecting banks' loan business. *See id.* As to permitting small-town banks unaffiliated with bank holding companies to sell insurance, the Legislature appeared concerned with "lack of availability of insurance in smaller towns." *See id.* Nothing prohibits the Legislature from considering such competing interests and crafting exceptions when forging its regulatory rules. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303-305 (1976). Indeed, this Court "consistently has recognized that in addressing complex problems a legislature may take one step at a time, 'addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Bowen v. Owens*, 476 U.S. 340, 347 (1986) (quoting *Williamson v. Lee Optical*, 348 U.S. at 488-89); *see North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973).

[31] Indeed, the inclusion of such exceptions belies the contention that the general prohibition was enacted exclusively to protect insurance agents. Applying the Petitioner's and the OCC's own logic, if "simple economic protectionism" was the actual purpose, *see* Petr. Br. at 19, why weren't *all* banks excluded from selling *all* forms of insurance?

Petitioner cannot avoid the inevitable conclusion that Fla. Stat. § 626.988 was enacted "for the purpose of regulating the business of insurance." Therefore, it may not be superseded or preempted by a federal Act unless that Act "specifically relates to the business of insurance."

B. Neither Section 92 nor the Act in Which It Is Contained Specifically Relates to the "Business of Insurance."

Every court that has addressed the issue has concluded that Section 92 does not "specifically relate to the business of insurance" within the meaning of McCarran. *See Barnett*, 839 F. Supp. at 841-42, *aff'd*, 43 F.3d at 636-637; *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992), *aff'd sub nom. on other grounds*, *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3069 (U.S. July 13, 1995) (No. 95-74); *First Advantage Ins. v. Green*, 652 So. 2d 562, 573-74 (La. Ct. App. 1st Cir. 1995).[32] As demonstrated below, that conclusion is correct.

In *Fabe*, this Court explained that a state law enacted for the purpose of regulating the business of insurance does not yield to a conflicting federal statute "unless [the] federal statute *specifically requires* otherwise." *Fabe*, 113 S. Ct. at 2211 (emphasis added); *see also Prudential*, 328 U.S. at 429-30 (explaining that federal laws may not displace state laws regulating the business of insurance "except as otherwise expressly provided in the Act itself or in future legislation"). In *Fabe* this Court described this specificity requirement as a "clear-statement rule" of intent to preempt: unless it is *clear* Congress had such

[32] *Accord* Jason M. Koral, Recent Cases, *Bank Holding Companies and "The Business of Insurance": Interpretation of McCarran-Ferguson* in Owensboro National Bank v. Stephens *and* Barnett Bank v. Gallagher, 19 Harv. J.L. & Pub. Pol'y 217, 219-20 (1995) ("Primarily a banking statute, 12 U.S.C. § 92 is not open to interpretation as a law specifically relating to the business of insurance . . . . [It] fails to evince even a shred of intent to trump state insurance licensing authority.").

an intent, McCarran dictates that any conflicting state law enacted for the purpose of regulating the "business of insurance" must survive. 113 S. Ct. at 2211.[33] As explained below, to demonstrate the requisite intent, Congress must either expressly direct displacement of state law or attempt to control directly some aspect of the "business of insurance" the regulation of which is otherwise expressly delegated to the States. Section 92 does neither.

Petitioner and the OCC argue that a federal statute that authorizes a national bank to sell insurance *must* "specifically relate to the business of insurance" if a law that prohibits banks from being licensed to sell insurance regulates that business. *See* Petr. Br. at 41; OCC Br. at 23. However, this simple equation ignores the different purposes of each provision. As demonstrated below, because Section 626.988 was designed to assist in the selection of an appropriate risk transfer mechanism, it "regulates the business of insurance," whereas Section 92

[33] All available evidence supports the *Fabe* Court's conclusion that Congress intended to create an express intent-to-preempt requirement. Both the House and the Senate versions of the original bill provided that "[n]o act of Congress . . . shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such act specifically so provides." 91 Cong. Rec. 1085 (1945) (quoting the House Judiciary Committee's S. 340, § 2(b), as amended, 79th Cong., 1st Sess. (1945)); 91 Cong. Rec. 488 (1945) (quoting S. 340, § 2(b), 79th Cong., 1st Sess. (1945)). The change from "unless the act specifically so provides" to "unless the Act specifically relates to the business of insurance" was made on the last day of a three-day conference, after the antitrust proviso was appended to the end of Section 2(b). If no amendment to the "specifically so provides" language had been made, the statute would have included the cumbersome clause, ". . . specifically so provides: *Provided*, That . . . ." Especially in the absence of any explanatory colloquy or any discussion in the Conference Report, the most obvious explanation is that this amendment was made simply to avoid awkward syntax. There is no evidence the conferees intended a substantive change in meaning. Indeed, in explaining the pre-conference language, Senator Ferguson used the phrases interchangeably. *See* 91 Cong. Rec. 479 (1945).

does not "specifically relate" to that business because it was not designed to address risk transfer concerns.[34]

Petitioner and the OCC both argue that Section 92 specifically relates to the business of insurance "because it permits national banks to engage in one aspect of that business." OCC Br. at 21; *see* Pet. Br. at 42. In making this contention, they disregard the three-pronged inquiry necessitated by McCarran's text: whether (1) an "Act of Congress" (2) "specifically relates" to (3) the "business of insurance." Petitioner and its *amici* appear to argue that any federal law that even mentions the word "insurance" must "relate" to the "business of insurance." In so doing, they not only confuse the "business of insurance" with "insurance," but they also read the qualifier "specifically" out of the statute and ignore this Court's recent pronouncement on the meaning of the word "relates." A proper understanding of the scope of the three-pronged inquiry necessitates the conclusion that Section 92 is *not* an "Act of Congress" that "specifically relates to the business of insurance."

The cornerstone of this inquiry—the "business of insurance"—is a term of art that is decidedly narrower than "insurance" generally. *See National Securities*, 393 U.S. at 459. It encompasses those laws and practices designed to impact the "transferring or spreading" of risk. *Pireno*, 458 U.S. at 129.[35] McCarran thus requires an inquiry

[34] As the *Fabe* dissent would put it, Fla. Stat. § 626.988 "increase[s] the reliability" of the insurance transaction while Section 92 does not. 113 S. Ct. at 2217 (Kennedy, J., dissenting).

[35] This Court has never examined in detail the scope of the "specifically relates" clause. In analyzing the term "business of insurance" in the other two places it appears in Section 2(b), as well as in analyzing that same term in the ERISA context, the Court has utilized the factors identified in *Pireno* and *Royal Drug* to delineate what laws and practices fall with the ambit of that term. *See, e.g., supra* n. 25 (discussing *Fabe's* reliance on *Pireno*); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743-44 (1985).

into whether Section 92 not only "relates" but "specifically relates" to this business. Only last Term, this Court unanimously cautioned against just the type of broad interpretation of the term "relates" Petitioner advocates, particularly in the context of preemption provisions:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. . . . But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

Blue Cross, 115 S. Ct. at 1677.

This caution is especially warranted here because the "Act of Congress" at issue must *"specifically* relate" rather than merely "relate" in order to attain preemptive effect under McCarran. Accordingly, the relationship must be "[p]recisely formulated or restricted; definite; explicit." *Black's Law Dictionary* 1398 (6th ed. 1990). Indeed, "the plain meaning of the term 'specific' . . . [is] 'having a real and fixed relationship to [and] restricted by nature to a particular individual, situation, relation, or effect.'" *Lohr v. Medtronic, Inc.,* 56 F.3d 1335, 1346 (11th Cir. 1995) (quoting *Webster's New International Dictionary* 2187 (3d ed. 1976)). Thus, Section 92 can be construed to preempt state law only if it "relates" to the "business of insurance" with *definiteness, exactness,* and *precision.*

In attempting to determine whether the state statute at issue in *Blue Cross* merely "related to" employee benefit plans, the Court looked to its earlier interpretations of the word "relates" [36]—interpretations on which Petitioner and its *amici* rely—and concluded that they were useless even in the ERISA context in which they had been developed:

[36] *See, e.g., Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-97 (1983).

> We simply must go beyond the unhelpful text and the frustrating difficulty of defining ["relates to"], and look instead to the *objectives* of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

115 S. Ct. at 1677 (emphasis added). After examining ERISA's objectives in *Blue Cross,* the Court turned to the "purpose and effect" of the state law at issue to determine whether it satisfied these objectives. *Id.* at 1678. Similarly, this Court should look to "the objectives of" McCarran "as a guide to the scope of the" *federal* law that Congress "understood would survive" under the "specifically relates" test.

As Petitioner recognizes, McCarran's objective was to ensure that, in the insurance realm, "'the rights of the States to regulate and collect taxes [w]ould not be repealed by implication.'" Petr. Br. at 32 (quoting 91 Cong. Rec. 481-82 (1945) (statement of Sen. Radcliffe)). Congress wanted no unintentional displacement of state insurance regulations. Indeed, as Senator Revercomb emphatically stated:

> We want the business [of insurance] left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.

91 Cong. Rec. 485 (1945). And, as the Court has now repeatedly made clear, the realm of the "business of insurance" that Congress sought to protect centers on the transfer or spreading of risks through insurance contracts. That is, Congress intended to preserve for the States the sole authority to regulate the many different facets of that risk-spreading process including, most specifically, the terms of protection of the insured. *See, e.g., Fabe,* 113 S. Ct. at 2208-09; *id.* at 2213-16 (Kennedy, J., dissenting); *Pireno,* 458 U.S. at 127-31.

It is therefore clear that Congress understood that no federal law could be construed to supersede such state

regulations unless the federal law "specifically related" to the transfer or spreading of risk—unless, through the enactment of that federal law, Congress specifically intended to supplant the States' prescription of "the terms of protection of the insured." *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 321 (1943).[37]

To determine whether Congress had such an intent when it enacted Section 92, the Court must examine the statute's "purpose and effect." *Blue Cross*, 115 S. Ct. at 1678. As both Petitioner and the OCC concede, the "purpose and effect" of Section 92 is far-removed from any of the objectives with which Congress was concerned in McCarran: "[w]e may certainly assume that in authorizing national banks in small towns to sell insurance, *Congress's primary purpose was to regulate banking.*" OCC Br. at 21 (emphasis added); *see also* Petr. Br. at 45-46. Indeed, no aspect of Section 92, the 1916 Act in which it was enacted, or the Federal Reserve Act of which it was made a part, is designed to impact the transfer or spreading of risk in any way. They do not "specify" any intrusion on any aspect of the "business of insurance" otherwise expressly reserved to the States in McCarran.

The sole "purpose and effect" of Section 92 is to provide corporate power to enable small-town national banks to obtain an additional source of revenue to better compete with state-chartered banks. *See* 53 Cong. Rec. 11001 (1916). This grant of authority is not something the States could, under any circumstances, accomplish; it is

[37] Just as "[a] *specific* intent crime is one in which the defendant must not only intend the act charged, but also intend to violate the law," *United States v. Birkenstock*, 823 F.2d 1026, 1028 (7th Cir. 1987) (emphasis added), Congress must not only intend to legislate with regard to "insurance," but must also intend to penetrate the state regulation of the "business of insurance"—a realm protected by McCarran—for an enactment to "*specifically* relate" to that business.

purely a prerogative of Congress. Thus, the mere fact that Congress granted this federal charter authority to small-town national banks in no way evinces an intent—or demonstrates the effect—of treading on the state-regulated area of insurance. Congress exercised its authority in a completely federal sphere. Put differently, it was not "specifying" its impact on, or displacement of, the state-regulated "business of insurance."

"The crucial point is that here [Congress] has focused its attention on [national bank] protection; it is not attempting to secure the interests of those purchasing insurance policies." *National Securities*, 393 U.S. at 460. For this reason, Petitioner's and OCC's contention that a federal statute that authorizes a national bank to sell insurance *must* "specifically relate to the business of insurance" if a law that prohibits licensed agents from affiliating with banks regulates that business, *see* Petr. Br. at 41; OCC Br. at 23, is incorrect. As demonstrated, the aims of the two provisions are fundamentally different, and that difference dictates that the provision designed to assist in the selection of an appropriate risk transfer mechanism "regulates the business of insurance," while the provision that was not designed to address risk transfer concerns bears no specific relationship to that business.

Petitioner's citation to federal insurance schemes that it asserts "specifically relate to the business of insurance" underscores this distinction. *See* Petr. Br. at 46. Such schemes directly affect the transfer or spreading of a policyholder's risk by either dictating some of the terms of that transfer or actually creating a new insurance source; Section 92 does neither. In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *rev'd on rehearing on other grounds*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989), for example, the Fifth Circuit found that the Longshore and Harbor Workers' Compensation Act ("LHWCA")—a comprehensive insurance compensation scheme—"specifically relates

to the business of insurance." Not surprisingly, the LHWCA and its implementing regulations contain numerous provisions which dictate specific insurance policy terms. *See* 33 U.S.C. § 935; *see also* 20 C.F.R. Part 703. Similarly, the National Service Life Insurance Act of 1940, discussed in *Wissner v. Wissner,* 338 U.S. 655 (1950), established a federal life insurance plan for military personnel, underwritten by the federal government, separate from the private-sector business.[38] In stark contrast, the Federal Reserve Act in general, and Section 92 in particular, are "bank laws" that regulate ancillary activities of national banks and other federally insured depository institutions; they in no way direct the manner in which insurance risks are allocated and transferred.

Because the Federal Reserve Act and Section 92 neither dictate displacement of state laws that regulate the "business of insurance" nor specify their relation to that state-controlled business in any way—but rather merely grant federal authority in a realm wholly apart from States' power—they may not be deemed to "specifically require" preemption of such state laws. McCarran thus

[38] Cases in which federal courts have determined that federal tax provisions apply to insurance companies because the provisions "specifically relate to the business of insurance" appear to have been decided on the wrong grounds as there is no evidence that such federal tax provisions conflicted with state law requirements in any way. *See, e.g.,* Petr. Br. at 46 (citing *Hanover Ins. Co. v. Commissioner,* 598 F.2d 1211 (1st Cir.), *cert. denied,* 444 U.S. 915 (1979)); *cf. National Securities,* 393 U.S. at 466-68 (federal securities reporting requirements are not in conflict with Arizona law and thus apply to insurance company transactions even though those reporting requirements are not specifically related to the business of insurance).

Any reliance on *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 114 S. Ct. 517 (1993), also is misplaced because the statute at issue there—ERISA—contains express preemption and savings clause provisions that purport to govern which state laws continue to apply. Thus, unlike in Section 92, Congress specifically dictated how the federal law would interact with state insurance regulations.

mandates that neither the Federal Reserve Act nor Section 92 may be construed to invalidate, impair, supersede, or preempt Section 626.988—a law enacted "for the purpose of regulating the business of insurance."

CONCLUSION

For all of the foregoing reasons, the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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December 8, 1995